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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

David H. Lucas, *Petitioner*,

v.

SOUTH CAROLINA COASTAL COUNCIL, *Respondent*.

On Writ of Certiorari to the Supreme Court
of the State of South Carolina

BRIEF OF THE MEMBERS OF THE NATIONAL GROWTH MANAGEMENT LEADERSHIP PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Does the Federal Constitution deny State legislatures the power to prevent public harm through the use of building restrictions that incidentally deprive some land of current market value?

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BRIEF OF THE MEMBERS OF THE NATIONAL GROWTH MANAGEMENT LEADERSHIP PROJECT[1] AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The National Growth Management Leadership Project (NGMLP) is an association of state and regional conservation and planning organizations[1] to encourage and promote comprehensive land use planning as a policy tool to address

[1] Greenbelt Alliance, Colorado Environmental Coalition, Hawaii's Thousand Friends, Natural Resources Council of Maine, Chesapeake Bay Foundation, New Jersey Future, 1000 Friends of Oregon, Pennsylvania Environmental Council, Save The Bay, South Carolina Coastal Conservation League, Vermont Natural Resources Council, and Washington Environmental Council join in this brief.

resource conservation, housing, transportation and other key public concerns. Its focus is on both comprehensive planning for urban areas as well as rural growth management issues affecting such resource lands as wetlands, shorelands, agricultural and forest lands and wildlife habitat.

A key question in this case is the extent to which the Takings Clause authorizes courts to rethink State legislatures' determinations to enact land use laws as measures to prevent serious public harms. Any reallocation of ultimate land-use authority from legislatures to the judiciary on the rationale of "regulatory takings review" would diminish legislatures' abilities to apply comprehensive planning techniques as a policy tool. The participants in the NGMLP are concerned that the resolution of the present case not, in its potentially broader sweep, jeopardize traditional and innovative comprehensive land-use planning techniques -- within the limits set down by this Court's "takings" decisions throughout this century.

This brief is filed on written consent, filed herewith, of all parties.

STATEMENT OF THE CASE

South Carolina's Beachfront Management Act (S.C. Code Ann. §§ 48-39-10 et seq.) prohibits Mr. Lucas from erecting any substantial structure on his two beachfront lots, essentially eliminating the land's current market value. Notwithstanding this impact, however, South Carolina's Supreme Court upheld the building prohibition, finding it to be within the States' longstanding legislative authority to forbid conduct that causes serious public harm. *Lucas v. South Carolina Coastal Council,* 404 SE2d 895, 899 (1991).

SUMMARY OF ARGUMENT

A State has unquestioned authority to prohibit, without compensation, property uses that injure others. The States' power to ban property uses deemed deleterious are upheld within a very "broad range."

This Court's decisions leave no doubt that public welfare can justify even a total destruction of property rights without compensation. It is well settled, for example, that the Takings Clause allows innocent owners' property to be forfeited *in toto* as a "defense" against detrimental use. Certainly, States can also apply the more limited means of merely forbidding the deleterious uses themselves -- even when doing so takes all current market value of some properties.

In any event, "all value" is not the same as "all use." None of this Court's modern "regulatory taking" cases has actually *held* a use restriction to be a "taking" solely because it removed all current market value (as distinguished from all *use*). Moreover, the States' land-use authority should not depend on current market conditions.

Most importantly, judicial review of the "takings" issue must not become a pretext for judicial reassessments of purposes and means selected by the States' legislatures. This Court's decisions support no such rethinking in the economic sphere. South Carolina's legislature concluded that the harmful effects of beachfront development justified a ban on that use. The law's incidental economic impact is not a cue for judicial intercession, nor is it prima facie proof that the legislature's weighing went awry.

The concept of socially detrimental land use fluxes and changes with changing social norms, knowledge and context. To preserve the legislative function to the legislatures, regulatory taking review should adhere to Justice Holmes' approach in *Pennsylvania Coal v. Mahon,* the case

that established the regulatory taking concept: So long as the purposes and means are valid, land use laws should be deemed "takings" only if they go so far that they are (as in *Mahon*) the generic equivalent of physical requisitions for public use.

ARGUMENT

South Carolina's beachfront building restriction essentially eliminates the current market value of Mr. Lucas' land. That impact does not, however, mean this Court should overturn the State legislature's determination to enact the restriction as a measure to prevent public harm.

POINT I.

The legislative power to restrict property uses extends, potentially, to all uses that have harmful impacts on other individuals or the public generally.

Restricting the uses that owners can make of their property is one of the primary ways that government carries out its essential purpose of preserving the general public welfare. *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 US 470, 491 (1987). In carrying out its governmental responsibility, a State has:

> "unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Keystone,* 480 US at 511 (Rehnquist, C.J., dissenting).

As Justice Stevens explained, writing for the majority,

> "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone,* 480 US at 491, n. 20.

A key point of difference between the *Keystone* majority and dissent is how broad (or narrow) is this harm-prevention "exception" to the Fifth Amendment's compensation guarantee. US Const. Amend. V. Referring to it as the "nuisance exception," the dissenting Justices observed that it is not "coterminous with the police power itself," and the majority did not disagree. *See Keystone*, 480 US 491, n. 20, and 512 (Rehnquist, C.J., dissenting). But given that the "exception" is not coterminous with the State's "multifaceted health, welfare, and safety" powers, *id.* at 513, how broad is it?

1. The "Nuisance Exception" and Common Law Nuisances-- The very name "nuisance exception" suggests an exception to the Takings Clause guarantee that applies only to uses that are "nuisances" at common law, or something very close. *See Florida Rock Indus. v. United States,* 21 Cl.Ct. 161, 166-68 (1990) ("considered a nuisance"). *See also Lucas,* at 906 (1991) (Harwell, J., dissenting). Logically, to be sure, the common law of nuisance almost certainly establishes the *minimum* reach of the exception, for nothing is "taken" when legislation merely forbids the already forbidden. If, however, the governmental power to restrict land use were solely confined to uses considered nuisances anyway, land use legislation would be vastly more circumscribed than we know it today -- limited essentially to codifying the common law. The so-called "nuisance exception" is surely broader.

Thus, although the common law of nuisance has long been held to provide "a fairly helpful clew" in evaluating the validity of land use regulations, it is to be consulted "not for the purpose of controlling, but for the helpful aid of its

analogies. . . ." *Euclid v. Ambler Realty Co.*, 272 US 365, 387 (1926). The majority opinion in *Keystone* plainly acknowledged the exception's greater breadth when it used phrases such as "akin to a public nuisance," *Keystone,* 480 US at 488, "similar to public nuisances," *id.* at 492, and "nuisance-like," *id.* at 491, n. 20, to describe the kinds of land uses that a State can prohibit without paying compensation. It noted, moreover, that this Court had not in the past felt required to "weigh with nicety" the question of whether there was a nuisance according to the common law. *Id.* at 490, quoting *Miller v. Schoene,* 276 US 272, 280 (1928) (upheld uncompensated destruction of cedar trees to protect nearby apple trees owned by others). And it stated that "no individual has a right to use his property so as to create a nuisance or *otherwise* harm others." *Keystone*, 480 US at 491, n. 20 (emphasis added).

Clearly, in *Keystone,* as in so many previous cases, this Court did not regard the legislative power to restrict harmful uses to be limited to uses considered "noxious" or nuisances at common law. *See e.g., Renton v. Playtime Theatres,* 475 US 41, 54 (1986) (banning adult theaters on certain sites as "the essence of zoning"); *Andrus v. Allard,* 444 US 51 (1979) (trading in eagle feathers); *Agins v. Tiburon,* 447 US 255 (1980) (lots smaller than 1-5 acres); *Belle Terre v. Boraas,* 416 US 1 (1974) (six students in a house); *Goldblatt v. Hempstead,* 369 US 590 (1962) (mining gravel); *Perley v. North Carolina,* 249 US 510 (1919) (timber scraps left on ground); *Welch v. Swasey,* 214 US 91 (1909) (tall buildings); *Hudson Water Co. v. McCarter,* 209 US 349 (1908) (selling water interstate); *Powell v. Pennsylvania,* 127 US 678 (1888) (margarine); and *Mugler v. Kansas,* 123 US 623 (1887) (alcoholic beverages). On the contrary, so far as can be discerned from *Keystone* and these other precedents, the legislative power to restrict the use of property extends, potentially, to all uses that the legislature

deems likely to harm or injure other persons or the community as a whole.

Although the *Keystone* dissent acknowledged government's "unquestioned authority" to forbid property uses that "injure others," *Keystone,* 480 US at 511, the dissent seemingly ascribed a lesser range to this "exception." Describing it as a "narrow exception allowing the government to prevent 'a misuse or illegal use,'" *id.* at 512, the dissent quoted dicta from an "*arguendo*" discussion in *Curtin v. Benson,* 222 US 78, 86 (1911) (HELD: Secretary of Interior was not empowered to limit uses of private inholdings in Yosemite Park). Besides being dicta, however, the *Curtin* "misuse or illegal use" test is also circular: All uses banned by legislation are by definition illegal and, hence, misuses of property -- provided the legislation is valid, which is of course precisely the point at issue. To accept the *Curtin* dictum on its face would require affirmance of the decision below: Building houses on beaches in violation of South Carolina's Beachfront Management Act would be an *illegal* use and, hence, a misuse of land. S.C.Code Ann. § 48-39-170.

In sum, neither the *Keystone* majority nor the Court's other precedents (nor even, probably, the *Keystone* dissent) would confine legislatures' power to restrict land uses solely to nuisances at common law. Because nuisance law is so often invoked as a source of guidance, however, it becomes critical to ask: What exactly is the relation between the common-law nuisance, the police power and property rights?

2. Common Law Nuisances, the Police Power and Property Rights-- "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded. . . . The limits set to property by other public interests present

themselves as a branch of what is called the police power of the State." *Hudson Water Co. v. McCarter,* 209 US 349, 355 (1908) (Holmes, J.)

Some "nuisance regulations" exempted from the Fifth Amendment may have rested on "discrete and narrow purposes," *see Keystone,* 480 US at 513 (Rehnquist, C.J., dissenting), but the same can scarcely be said of the whole wide array of safety, health, aesthetic and even lifestyle objectives that have been validly advanced under the police power. *E.g., Penn Central Transp. Co. v. New York City,* 438 US 104 (1978) (aesthetics); *Belle Terre v. Boraas,* 416 US 1 (1974) (family lifestyle); and other cases cited in subd. 1 of this POINT I. The limits on property use under the common law of nuisance can likewise hardly be said to have "discrete and narrow" purposes. On the contrary, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" Prosser & Keeton, TORTS 616 (5th ed. 1984).

Though now mostly encompassed within specific statutory offenses, the historic range of public nuisance, as it developed over the centuries, grew to be essentially co-extensive with the police power itself. *See, e.g., Copart Industries v. Consolidated Edison,* 41 NY2d 564, 568, 362 NE2d 968, 971 (1977) (acts that "endanger or injure the property, health, safety or comfort of a considerable number of persons"); *Commonwealth v. South Covington & Cincinnati Street Ry,* 181 Ky. 459, 463, 205 SW 581, 583 (1918) (act or omission that "injuriously affects the safety, health or morals of the public"); SECOND RESTATEMENT OF TORTS, § 821B (2)(a) (public health, safety, peace, comfort or convenience). Already in 1256, Bracton was writing of "*nocumentum contra communem utilitatem*" (nuisance against the common welfare "which must always and in every case be preferred to the private"). 3 Bracton, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE 196 (Thorne ed. 1977).

At the time our Constitution's Framers were learning their law, public nuisance was being defined as "either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing that the common good requires." 4 Blackstone, COMMENTARIES 167 (1769). *Accord,* I Hawkins, PLEAS OF THE CROWN 197 (1724).[2]

Not only did the courts add new kinds of public mischief to the public nuisance list as needs arose but, from the 16th century onwards, but so did Parliament. *See generally,* Spencer, Public Nuisance--A Critical Examination, 48 Cambridge L.J. 55 (1989). One of the first *legislated* public nuisances was a land-use regulation forbidding cottages to be built on rural lots of fewer than 4 acres freehold. *See* 4 Blackstone, at 168. Violations of the London building code of 1666 were another of the early legislated public nuisances. 19 Car.2, c. 3, III, in 8 Pickering's Statutes at Large (1763).

Following the War of Independence, State legislatures replaced Parliament as the principal legislators in the public nuisance field. On the validity of such laws, this Court said that it was "clearly within the police powers of the State . . . 'to declare that in particular circumstances and in particular localities a [use affecting the "health and comfort of the community"] shall be *deemed* a nuisance in fact and in law.'"

[2] Even Locke, for whom "great and chief end" of government was "the preservation of . . . property," agreed that "political power [is] a right of making laws [with penalties] for the *regulating* and preserving of property". Locke, TWO TREATISES OF GOVERNMENT Bk II, §§ 124 & 3 (Everyman ed. 1991). "For it would be a direct contradiction," Locke noted, "for any one to enter into society with others for the securing and *regulating* of property, and yet to suppose his land . . . should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is a subject." *Id.* at § 120. (All emphasis added.)

Hadacheck v. Sebastian, 239 US 394, 411 (1915), quoting *Reinman v. Little Rock,* 237 US 171 (1915) (emphasis added). Today legislatures usually make such public harms illegal without the circumlocution of actually denominating them as "public nuisances," but the principle is the same. No doubt influenced by the principle ***nulla poena sine lege*** ("no penalty without a statute"), essentially the entire "public order-common good" domain of common law public nuisance has been now embodied in specific police-power legislation -- subject to takings review.

The common law of *private* nuisance also affects and shapes the outer contours of property rights to use land. Like public nuisances, private nuisances also would hardly qualify as a "narrow and discrete" category of noxious or reprehensible conduct. *See generally,* Prosser & Keeton, at 619-33. To the contrary, "a nuisance may merely be a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.,* 272 US 365, 388 (1926). In addition to depending on location, classifying conduct as a nuisance also depends crucially on whether "the gravity of the harm caused outweighs the utility of the conduct," Prosser & Keeton, at 630, or on an even more complex weighing of various factors that are normal concomitants of private nuisance tests. *See generally,* Lewin, Boomer and the American Law of Nuisance: Past Present and Future, 54 Albany L.Rev. 189, 212-14, 234-36 (1990).

Perhaps the only objective feature that all adjudicated private nuisances truly have in common is that the defendant's land use had effects that spilled over the property line causing harm to the plaintiff. Prosser & Keeton, at 619 ("The essence of a private nuisance is an *interference*") (emphasis added). Far from referring to a discrete class of inappropriate conduct, "nuisance, as a general term, describes the *consequences* of conduct, the inconveniences to others, rather than the type of conduct involved." *See Copart*

Industries v. Consolidated Edison, 41 NY2d 564, 568, 362 NE2d 968, 971 (1977) (emphasis added); *see also* SECOND RESTATEMENT OF TORTS, § 821A, Comment c ("as used in the Restatement, 'nuisance' does not signify any particular kind of conduct on the part of the defendant"). Reviewing numerous examples Dean Prosser concluded that "nuisance, in short, is not conduct, nor is it even a condition. It is the invasion of an interest, a type of harm or damage. . . ." Prosser, Private Actions for Public Nuisance, 52 Virginia L. Rev. 997, 1004 (1966). The common law of nuisance is not, in other words, so much a flat prohibition of harms as it is a multi-factored balancing process to decide *which* harms to prohibit.

3. States May Redefine "Rights to Harm Others"-- Since the question first arose a century ago, the elemental principle has been recognized that laws to prevent harm or injury are not takings. *Mugler v. Kansas,* 123 US 623, 665 (1887) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"). The principle was invoked by both the majority and dissenting opinions of *Keystone,* 480 US at 491, n. 20 and 511 (*see* quotations from both in first paragraph of this POINT I, *supra*). Yet, despite the two opinions' apparent agreement on the general principle, an important difference remained between them, a difference that sharply raises the question: Do *all* harms or injuries that a land use inflicts on others count as "harm" or "injury" for purposes of the principle? Or, are there categories of harm or injury that a State cannot constitutionally prohibit without paying compensation?

Legal rights to use property in ways that incidentally harm innocent others are well known in our law -- they are the essence of *damnum sine injuria*. Even quite substantial harms can be lawfully visited on others (for example, flooding neighbors by diverting surface water), or on the

community (demolishing an inspirational landmark; or smokestack emissions that cause acid rain), all depending on the policy judgments and choices reflected in the applicable law. *See, e.g., Johnson v. Whitten,* 384 A2d 698 (Me. 1978) (surface water); *Hatch v. W.S. Hatch Co.,* 3 Utah2d 295, 283 P2d 217 (1955) (noise, fumes, bright lights); *Bove v. Donner-Hanna Coke Corp.,* 236 App.Div. 37, 258 NYS 229 (1932) (heavily polluting coke plant across from residence).

More generally, the universe of such "rights to harm others" in connection with land use comprises the whole range of *damnum sine injuria* lying between a baseline of "zero" impact and the points at which, by common law or statute, a use's external impacts become actionable or indictable. Such a range of rights to harm is, as a practical matter, unavoidable. Valuable uses of land often have negative impacts on neighboring valuable uses or come into conflict with other private or societal goals. A legal rule that prohibited all such detrimental spill-overs would be not only highly impractical but, probably, an economic disaster. Therefore, when persons complain about negative impacts from others' land uses, there is often no sensible policy choice except to decide that, on balance, the public interest is best advanced by allowing the uses (*e.g.*, an important industry) despite their associated harmful effects on neighbors or the community at large.

Although property ownership must, as a practical matter, involve various incidental rights to effect spill-over harms, it surely does not follow that any such rights to harm should ever be constitutionally *inviolable*. On the contrary, the legislature needs be free to extend or withdraw such rights to harm others and, in effect, to reset the thresholds of "nuisance" as new conditions from time to time arise. To hold otherwise, that some harm-producing conduct is beyond State power to ban, except with compensation, is to deny State legislatures vital authority to respond in law to change.

It is the very essence of the legislative function to respond to the changing balance of societal needs with measures to protect the public welfare, even though there may incidentally be secondary effects on private wealth. *See* discussion in POINT III, *infra.* There is no supervening federal law of *damnum sine injuria* to backstop private owners' rights to engage in harm-producing uses of land. A legislature's decision to enlarge the list of forbidden detrimental conduct should be dispositive.[3]

POINT II.

A public purpose to prevent harmful uses of property can justify legislative measures that remove all current market value.

This Court's decisions leave no doubt that public welfare concerns can justify even a total destruction of property rights without compensation. Measures to protect public health are one example. *E.g., North American Cold Storage Co. v. Chicago,* 211 US 306 (1908) (confiscation of spoiled food); *see, e.g.,* 21 USCA § 673 (Supp. 1991) (authorizing seizure of adulterated meat, etc.). Public "emergency" situations are another. *Bowditch v. Boston,* 101 US 16, 18 (1879)

[3] Note that it does not necessarily follow as a corollary that, when the legislative purpose is to *benefit* the public, compensation is required. Such a so-called harm/benefit distinction is often described as illusory inasmuch as a given legislative act can usually be characterized equally well as both preventing harm and securing benefit -- there being no "benchmark standard of objectivity." *Loveladies Harbor v. United States,* 15 Cl.Ct. 381, 389-90 (1988). By contrast, *physical invasion* or permanent physical occupation is a kind of regulatory effect that is very distinct from a mere use restriction -- and one that virtually always requires compensation. *Nollan v. California Coastal Comm.,* 483 US 825, 831-32 (1987).

(blowing up a house to stop spread of fire). *See also United States v. Caltex,* 344 US 149, 154 (1952) (destroying terminal facilities in path of hostile forces), quoting *United States v. Pacific Railroad,* 120 US 227, 234 (1887) ("The safety of the state in such cases overrides all consideration of private loss"). Modifications of the medieval estate-system structure to meet twentieth century needs are still another. *Demorest v. City Bank Farmers Trust Co.,* 321 US 36, 48 (1944) ("The whole cluster of vexatious [ancient property intricacies] . . . is one whose history admonishes against unnecessary rigidity"). *See also Connelly v. Pension Benefit Guar. Corp.,* 475 US 211, 225 (1986) (upheld Act that "completely deprives").

1. Takings *in Toto* Justified by a Purpose to Prevent Detrimental Use-- A most important class of total takings to prevent detrimental use of property is the statutory forfeiture of land or chattels used in "undesirable" ways, as legislatively determined. *Van Oster v. Kansas,* 272 US 465, 467 (1926) (transporting liquor). "[T]his Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment." *United States v. U.S. Coin & Currency,* 401 US 715, 721 (1971). The fact nonetheless remains that "legitimate governmental interests," or "legitimate purposes," *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 US 663, 688 and 690 (1974), can justify *in toto* takings despite extreme impingement on private property rights. To prevent use of narcotic drugs, for example, forfeiture can apply not just the to drugs themselves but, even more significantly, to the *innocent* owner's vessel in which the drugs were found. *Id. See also United States v. $8,850,* 461 US 555, 562 n. 12 (1983) ("important governmental purposes").

The government should not, of course, have to pay compensation when it confiscates such obviously "noxious"

contraband as narcotics, switchblade knives or homemade bombs. But legislative power to create new classes of contraband in order to prevent detrimental use is far more inclusive, extending to uses that are not especially "evil" at all *e.g.*, drinking alcoholic beverages, fishing with nets, or removing trash from San Francisco. *See, e.g., Van Oster v, Kansas,* 272 US 465 (1926); *Lawton v. Steele,* 152 US 133 (1894); *cf. Reduction Co. v. Sanitary Works,* 199 US 306, 311, 317-18 & 321 (1905). In short, forfeiture can be applied not only to prevent property uses that are malum in se but to malum prohibitum as well. *Calero-Toledo,* 416 US at 684; *see, e.g., United States v. $8,850,* 461 US 555 (1983) (entering U.S. with $8,850 and not notifying government); *Goldsmith-Grant Co. v. United States,* 254 US 505 (1920) (use of automobile in aid of tax evasion).

The reason that "inquiry into the guilt or innocence of the owner [can] be dispensed with" is that "state lawmakers, in the exercise of their police power, [are] free to determine that certain uses of property [are] undesirable" and then adopt confiscation as a "secondary defense against a forbidden use." *Calero-Toledo,* 416 US at 686. *Accord, Goldsmith-Grant,* 254 US at 513 ("It is the illegal use that is the material consideration . . . the guilt or innocence of its owner being accidental"). However one looks at it, statutory forfeiture is a clear modern example of the public interest justifying *in toto* takings of innocent owners' property irrespective of fault, breach of duty, wrongdoing or illegality on the owner's part.

2. Takings Merely of the Detrimental Use-- Although taking entire ownership interests can be quite effective as a "defense" against "undesirable" uses of property, legislatures normally choose less drastic measures. Relevant public welfare concerns usually can be served by taking merely the undesirable use itself, not ownership as a whole. Ordinary

land-use regulations and housing codes are obvious examples of these less drastic measures.

Even when legislatures take only the uses deemed socially detrimental, however, the result may still eliminate the current market value of some properties. An unsanitary tenement house, for example, can be unfit for human habitation under the local housing code and yet, due to high repair or demolition costs, it might have no other "economically viable use" either. *See, e.g., Tenement House Dept v. Moeschen,* 203 US 583 (1906), *affirming without opinion* 179 NY 325, 72 NE 231 (1904) (tenement owner ordered to replace outdoor privy with expensive indoor toilets). The State surely does not have to "buy" such an unfit structure in order to have it vacated -- a view sustained by this Court in affirming the *Moeschen* case *per curiam. Id. See generally,* J. Gilbert, Tenements and Takings, 18 Fordham Urban L.J. 437 (1991) (full background of *Moeschen* case).

The Beachfront Management Act has the same effect on Mr. Lucas that New York's Tenement House Law had on Mrs. Moeschen. In both cases, essentially all value was removed when the legislature banned certain uses that it determined to be socially deleterious. In both cases, too, the prohibited uses could be regarded, at least in the abstract, as respectable uses for their times (building on beachfronts or, in *1906,* operating a tenement house without plumbing). And in both cases the bans are justified by the respective legislatures' determinations that new knowledge and, perhaps, evolving social needs, values and progress had made uses that were once acceptable too detrimental to allow any longer.

Summing up to this point, the law is well settled that the Takings Clause allows innocent owners' property to be taken *in toto* as a "defense" against uses that the legislature determines to be socially detrimental. That being so, it would be anomalous if States could not also employ the more

limited means of merely forbidding the particular deleterious uses themselves -- even if, on occasion, those uses happen to account for the entire current market value of some properties affected.

3. "All Value" is Not "All Use"-- This Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transp. Co. v. New York City,* 438 US 104, 131 (1978). Indeed, as has been for many decades explicit, regulations can remove very large proportions of value and still not be compensable takings. *See Euclid v. Ambler Realty Co.,* 272 US 365 (1926) (75%); *Hadacheck v. Sebastian,* 239 US 394 (1915) (92.5%); both modernly cited with approval, *e.g., Penn Central,* 438 US at 125-26 and 131.

But what if the diminution of a property's current value approaches totality? Regulations that go "too far" may effect a taking. *Pennsylvania Coal Co. v. Mahon,* 260 US 393, 415 (1922). Does this mean that the incidental removal, by regulation, of the last few percentage points of current market value converts a valid exercise of the police power into a "taking" that requires the State to pay the *entire* market value?

No decision of this Court has, of course, ever given talismanic significance to the last few percentage points of current market value. Nonetheless, in recent years some have seen a basis for according such disproportionate significance to the last decrements of value in this Court's "economically viable use" criterion of taking. *Compare, e.g., Loveladies Harbor v. United States,* 21 Cl.Ct. 153, 160 (1990) (tidal wetlands: 99% reduction invalid), and *Florida Rock Industries v. United States,* 21 Cl.Ct. 161, 175-76 (1990) (freshwater wetlands: 95% reduction invalid), *with Hadacheck v. Sebastian,* 239 US 394, 405 (1915) (brickyard ban: 92.5% reduction upheld).

Since 1980, this Court has repeatedly stated that a land-use restriction effects a taking if it "denies an owner economically viable use of his land." *Agins v. Tiburon,* 447 US 255, 260 (1980). *See also, e.g., Keystone,* 480 US at 495; *Nollan v. California Coastal Comm.,* 483 US 825, 834 (1987). The 1980 *Agins* opinion was the first occurrence of the "economically viable use" formulation as such.[4]

This Court had no occasion in *Agins,* nor since, to actually *hold* a land-use restriction in violation of the "economically viable use" criterion. The question is still to that extent open whether the Takings Clause gives owners a minimum, inviolable economic guarantee. Some things, however, are clear: First, the Takings Clause does not assure an owner against reductions in value, or the most valuable use. *Andrus v. Allard,* 444 US 51, 66 (1979); *Goldblatt v. Hempstead,* 369 US 590, 592 (1962). Second, the Takings Clause does not necessarily assure the owner a financial profit. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 US 419, 436 (1982); *Andrus,* 444 US at 66 ("loss of future profits . . . provides a slender reed upon which to rest a takings claim").[5] Third, regulations that deny an

[4] Just two years earlier, the counterpart prong of essentially the same two-part test was more tentative: "or *perhaps* if [the restriction] has an unduly harsh impact upon the owner's use of the property." *Penn Central,* 438 US at 127 (emphasis added).

[5] It is true, to be sure, this Court said in *Pennsylvania Coal Co. v. Mahon,* 260 US 393 (1922), that preventing a coal owner from mining the coal at a profit is "very nearly the same" as destroying it. But underground coal is an extremely atypical asset: Unless it is mined, it has no use at all. *Id.* at 414 ("For practical purposes, the right to coal consists in the right to mine it"). Extremely few kinds of property are so narrowly constrained in their usefulness -- and, most certainly, oceanfront land is not among them.

owner "all *use*" of his property (if not "all *value*") are highly likely to be viewed as regulatory takings. *See, e.g., Hudson Water Co. v. McCarter,* 209 US 349, 355 (1908) ("wholly useless," *per* Holmes, J.); *See also First English Evangelical Lutheran Church v. Los Angeles,* 482 US 304, 321 (1987) ("all use"); *Keystone,* 480 US at 513 ("all use") (Rehnquist, C.J., dissenting).

The Beachfront Management Act denies Mr. Lucas almost all of his lots' economic value, but the Act by no means denies all *use.* Removing literally "all use" would truly be the generic equivalent of a physical taking, reducing the ownership to an essentially theoretical status with no operational consequence in the real, physical world. Property "rights" are functionally gone once they cease to exist as matters of legal or any other significance. The same cannot, however, be said of regulations that merely remove current market value. Property rights that lack current market value not only can exist as matters of genuine significance but can even be highly prized by their owners. When a harm-prevention measure removes all value, that merely signifies that current potential buyers are only interested in acquiring the property for uses now regarded as too socially detrimental to allow.

This Court's modern "regulatory taking" cases do not, as noted earlier, contain any definite *holding* that land-use restrictions necessarily effect a compensable taking when they deprive some properties of current market value. (Indeed, *Calero-Toledo* and its "forfeiture" lineage are to the opposite effect, as discussed above.) There are, moreover, important reasons that counsel against adopting any value-oriented "takings" test that defines the scope of States' land-use authority in terms of current market conditions.

Many millions of acres of this nation's important natural resource lands (including the beaches and dunes of the present case) may, in their present natural condition, have

little commercial value by the standards of present-day markets. Thus, despite the potential cost to future generations, owners in our present generation often have an understandable temptation to displace important natural resource values in order to secure profit in the short-term. *See, e.g., Loveladies Harbor v. United States,* 21 Cl.Ct. 153 (1990) (tidal wetlands), and *Florida Rock Industries v. United States,* 21 Cl.Ct. 161 (1990) (freshwater wetlands). If the discourse on the long-term future of America's natural resources turns on nice distinctions about "all value" or "virtually" all value in short-term markets, the future will be, in the end, at the mercy of *transient market forces.*

What is at stake is our nation's ability to protect the natural resource base on which its vitality, economic viability, quality of life and natural beauty depend. During the past year or so the United States has been held liable for over $60 million to pay for "takings" that courts have held to occur as a result of national efforts to retain the natural character of a few hundred acres of alluvial valley floor and wetlands. *Whitney Benefits v. United States,* 926 F2d 1169 (Fed.Cir. 1991) (alluvial valley); *Loveladies Harbor v. United States,* 21 Cl.Ct. 153 (1990) (tidal wetlands), and *Florida Rock Industries v. United States,* 21 Cl.Ct. 161 (1990) (freshwater wetlands). By contrast, this nation has over 100 million acres of wetlands alone, less than one-half of the original total, but still an extraordinary amount of land if, to preserve it, the government would have to buy it all. *See* Zinn and Copeland, WETLAND ISSUES IN THE 102D CONGRESS, Congressional Research Service Issue Brief 91058 (9/12/91). Even if budget concerns were not an issue, there are others: There must be a better way to insure against shorted-sighted exploitation of posterity's patrimony than to put it all back in government hands.

Our free-market economy and private allocation of property have proved themselves unsurpassed as social tools

to achieve high living standards and a strong industrial base. These tools are not, however, flawless: Even the best market economy unavoidably suffers from "market failure," an inability to account properly for so-called external costs -- including the negative spill-overs from various land uses, and the tendency to discount excessively the rights of our descendants. No nation can disable itself from the defense of its resources, or leave them vulnerable to poorly planned development or badly executed utilization that may be prompted by short-term market conditions. Any rigid "economically viable use" guarantee under the Taking Clause would, however, do just that: It would make our elected legislatures' ability to restrain detrimental use of our American landbase constitutionally dependent on current market price.

POINT III.

The determination of whether, on balance, the harmful impacts from a property use justify forbidding the use is a decision that should be left to the legislature.

"Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference," SECOND RESTATEMENT OF TORTS, § 822, Comment g. A critical question of legal policy is which particular interferences should be prohibited and which ones, in the overall public interest, need to be allowed. *See* POINT I, subd. 3. The critical *constitutional* issue is which governmental forum ought to be deciding these questions of legal policy.

The constitutional tradition is clear: "Power to determine such questions, so as to bind all, must exist somewhere; . . . Under our system that power is lodged with the legislative branch of the government." *Mugler v. Kansas,*

123 US 623, 660-61 (1887). And "in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele,* 152 US 133, 136 (1894). Still, a legislature's own "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Id.* at 137. It is the proper scope of this judicial supervision as applied to alleged "takings" that is the crux of the issue in this case.

1. **Traditional Scope of Judicial Supervision**-- The question of whether a land-use regulation is a taking is much like the legislative question of whether a particular harm-inducing land use ought to be prohibited (or allowed): Both "necessarily require[] a weighing of private and public interests." *Keystone,* 480 US at 492, quoting *Agins,* 447 US at 261; *compare* discussion in POINT I. The close interrelation of these two questions presents the constant risk that judicial review of the "takings" issue may turn imperceptibly into a rethinking of the purposes and means selected by the elected legislature. This Court's decisions do not, however, support any such rethinking of legislative determinations.

Accordingly, though "the legitimacy of [legislative] purpose is a question of federal" law, *Keystone,* 480 US at 512 (Rehnquist, C.J., dissenting), this Court's decisions make clear that "a *broad range* of governmental purposes and regulations satisfies these requirements." *Nollan v. California Coastal Comm.,* 483 US 825, 834-35 (1987) (emphasis added); *see* partial listing at POINT I, subd. 1, *supra.* The constitutional review of "purpose" goes not to whether the legislature's purpose was a wise choice, but solely to whether that purpose falls within the "broad range" of legitimacy. In this case, it appears not even controversial that the State's enunciated purposes to prevent the detrimental

safety, economic and environmental effects of beachfront development fall within the range. *Lucas,* 404 SE2d at 896-88. *See Agins,* 447 US at 261.

Similarly, judicial "inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation," the constitutional question being only whether the "Legislature *rationally could have believed* that the [Act] would promote its objective." *Keystone,* 480 US at 511 n. 3 (Rehnquist, C.J., dissenting), quoting *Hawaii Housing v. Midkiff,* 467 US 229, 242 (1984). At any rate, South Carolina could hardly have found any more direct means to preserve the natural safety, economic and environmental functions of its beaches and dunes than by banning artificial modifications in the critical zones.

2. **"Economic Impact" and the Revision of Legislative Judgments**-- Beyond assuring that legislative purposes fall within the "broad range" and that the means selected are rational, this Court has identified several other factors as having "particular significance" for takings questions, *viz.* "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action." *Keystone,* 480 US at 495, quoting *Kaiser Aetna v. United States,* 444 US 164, 175 (1979).

The "character" and "reasonable investment-backed expectation" factors both tend to weigh against finding a taking in this case: The character of the regulation is in no sense a physical invasion, which usually demarks a taking; it is simply a restriction on use. *Keystone,* 480 US at 488 n. 18; *Penn Central,* 438 US at 124. As to the reasonableness of expectations, "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connelly v. Pension Benefit Guar. Corp.,* 475 US 211, 227 (1986). Shoreline development has been regulated in South Carolina

since 1977, long before Mr. Lucas bought his lots.

Although South Carolina's beachfront setback rule has an admittedly great "economic impact" on the current market value of Mr. Lucas' lots, it is no greater than the impacts in other cases where this Court has recognized that public interests can justify taking all use or ownership. *See* POINT II. Nor is the impact more extreme than the nature of the public interest requires. South Carolina's dunes and beaches, like many millions of other acres of America's remaining natural resource lands -- wetlands, tidelands, reservoir watersheds, alluvial valley floors -- generally present only two *practical* policy choices: Either regulate uses to prevent permanent loss of these lands' unique ecological character, or surrender their fate, and the quality of our descendants' national landbase, to the decisions of transitory market forces.

The South Carolina General Assembly decided that, on balance, the harmful effects of beachfront development were sufficient to justify a prohibition on such use, within certain lines. The "economic impact" question is, at bottom, whether this State legislative judgment should be overturned, at least for this case, because of its incidental effect to remove all market value from Mr. Lucas' lots. In other words, when a regulation's economic impact is very great, does it become the work of courts to re-exercise *de novo* that "large discretion" that is "necessarily vested in the legislature to determine . . . what measures are necessary" to protect public interests? *Lawton,* 152 US at 136 (emphasis added). Both precedent and practicality suggest not.

The precedents are, of course, the many cases discussed in POINT II, total takings for which this Court accepted, rather than re-weigh, the legislatively determined balance of interests. There are also, however, the practical concerns:

Knowledge, needs and values evolve with times and

circumstance and, in the process, the innocuous can become noxious, while the noxious grows benign. A hundred years ago, beer and margarine were legally noxious while Coca-Cola was made with cocaine. *See Powell v. Pennsylvania,* 127 US 678 (1888) (margarine); *Mugler v. Kansas,* 123 US 623 (1887) (beer); and *United States v. Housley,* 751 F.Supp 1446, 1447 (D.Nev. 1990) (cocaine). The valued wetlands of today were the noxious swamps, bogs and marshes of yesteryear. Beaches and riverbanks, once thought the perfect place for a house, are now viewed from the hindsight of disastrous floods in a very different way.

Thus, far from being fixed and timeless, the contours of "nuisance" shift and flux with ever-changing social norms, knowledge and context. *See* POINT I. Legislatures, facing regular re-election and constant constituent contact, are far better positioned than the judicial branch to exercise that "large discretion . . . to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton,* 152 US at 136. This is especially so in the economic sphere where "the fact is that virtually all economic regulation benefits some segments of the society and harms others." *Columbia v. Omni Outdoor Advertising,* 111 SCt 1344, 1352 (1991) (Scalia, J.).

The "reality [is] that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment." *Omni Outdoor,* 111 SCt at 1352. If legislative decisions to regulate objectionable land uses are "made subject to *ex post facto* judicial assessment of 'the public interest,' with personal liability of city officials a possible consequence, [this Court] will have gone far to 'compromise the States' ability to regulate their domestic commerce," *id.* -- and, one might add, to protect the viability of their domestic landbase.

That, precisely, is why "the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs . . . [T]here are benefits from a great river that might escape a lawyer's view." *Hudson Water Co. v. McCarter,* 209 US 349, 356-57 (1908) (Holmes, J.). And the same may no doubt be said of a coastline.

In short, this Court may agree or not that South Carolina's beach setback rules are, on balance, justified by the potentially deleterious external impacts that they avert, or that the economic impact on Mr. Lucas is likewise justified. The question, however, is whether the Takings Clause enjoins this Court to reach *de novo* determinations on these points and then to substitute those new determinations (if different) for those of South Carolina's General Assembly.

So far as the historical evidence reveals, the Takings Clause was not originally intended to apply to mere restrictions on use at all. *See,* e.g., Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 711 (1985). Certainly no such intention was reflected in the legal institutions of our country's formative years. *See* Reznick, Land Use Regulation and the Concept of Takings in 19th Century America, 40 U.Chi.L.Rev. 854 (1973). As late as 1897, this Court was still firmly of the view, based on an "immense weight of authority," that taking required a "physical invasion of the real estate." *Gibson v. United States,* 166 US 269, 275-76 (1897), quoting *Transportation Co. v. Chicago,* 99 US 635, 642 (1878): "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are *universally* held not to be a taking within the meaning of the constitutional provision." *Id.* (emphasis added).

The true origin of the regulatory takings law is Justice

Holmes' bold and brilliant judicial activism in *Pennsylvania Coal Co. v. Mahon,* 260 US 393 (1922). On the "particular facts" of the case, he discerned a degree of regulation that amounted to the functional equivalent of a taking, and he declared it such. *Id.* at 414 ("very nearly the same effect for constitutional purposes"). Notably, the balancing process that dominated the "substantive due process" part of Holmes' analysis (260 US at 412-414), played no role at all in his subsequent "takings" discussion (recently described by this Court as the "advisory opinion." *Keystone,* 480 US at 484). He simply treated as the generic equivalent of a physical taking that which, to all intents and purposes, had exactly the same effect as a physical taking.[6]

To preserve to State legislatures their essential legislative role to "determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety," *Mugler,* 123 US at 661, modern regulatory taking review should adhere to Justice Holmes' approach in the "takings" portion of *Mahon.* So long as the legislative purposes fit within the "broad range" of the legitimate and the means are rational, restrictions on use should not be deemed "takings" unless they are the full generic equivalent, in function and effect, of physical requisitions for public use.

Adhering to Holmes' approach, "takings" would of

[6] Justice Holmes' due-process effort to re-weigh the legislatively determined balance ("the public interest does not warrant much of this kind of interference") was, of course, quite normal "economic due process" analysis for the times -- the *Lochnerian* heyday of activist review, *Lochner v. New York,* 198 US 45 (1905) -- but it is quite contrary to modern "economic due process" standards of review. *See, e.g., Pennell v. San Jose,* 485 US 1 (1988); *Bowen v. Gilliard,* 483 US 587 (1987); *Day-Bright Lighting v. Missouri,* 342 US 421, 423 (1952) ("we do not sit as a super-legislature").

course include the entire originally intended ambit of the Takings Clause -- physically invasive impingements, in the guise of regulation or otherwise -- plus, at very least, a strong presumption of "taking" for regulatory actions like those this Court has previously found to be such. One obvious example would be a government regulation that utterly empties a property right of all operational consequence in the real world, so the right becomes effectively non-existent, precisely as occurred in *Mahon.* Another example would be a regulation whose wealth distribution effects are not merely incidental to legitimate public purposes but are, indeed, the very aim of the regulation. *See, e.g., Webb's Fabulous Pharmacies v. Beckwith,* 449 US 155 (1980) (state had authorized courts to simply retain interest earned on money deposited with them). *See also Nollan,* 483 US at 831 (requiring an owner to dedicate a public easement). And there is always the unfortunate possibility of governmental "misuse" of power, such as zoning to depress land values in anticipation of eminent domain, *see Urbanizorda Versalles v. Rivera Rios,* 701 F2d 993, 999 (1st Cir 1983) -- or, its near relative, an infringement that "utterly fails to further the end advanced as [its] justification." *Nollan,* 483 US at 837.

Recent decisions of this Court demonstrate clearly that, even with the traditional deference to legislatures' land-use purposes and means, the courts have ample room to address egregious cases. *See, e.g., Nollan,* 483 US at 838 ("this case does not meet even the most untailored standards"); and *Cleburne v. Cleburne Living Center,* 473 US 432, 448 (1985) ("the record does not reveal any rational basis"). The finer tuning of the land-use policy balance is, however, for the legislature. Standing alone, the fact that a public objective has extreme economic impacts on particular owners should not become a cue for judicial intercession, or prima facie proof that the legislature's weighing went awry.

The Framers placed their primary faith in elected legislatures, and it has become our basic constitutional assumption that, as times, needs and social values change, it falls within the classic province of elected legislatures to keep the laws attuned to the changing balance. To be sure, the legislature's own "determination as to what is a proper exercise of its police powers is not final or conclusive," *Lawton,* 152 US at 137. But it is true as well that "one branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Powell v. Pennsylvania,* 127 US 678, 685 (1888). *Accord, Bowers v. Hardwick,* 478 US 186, 194-95 (1986).

CONCLUSION

The decision below of the Supreme Court of South Carolina should be affirmed.

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